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No. 86-545

In the Supreme Court of the United States

October Term, 1986

RICHARD A. DUNCAN, *et al.*,
Petitioners,

vs.

VILLAGE OF MIDDLEFIELD, OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MEMORANDUM OPPOSING CERTIORARI

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This case arose as an appeal from Respondent's administrative denial of a variance which Petitioners requested to allow them to construct an eight-unit, multi-family dwelling behind their existing duplex dwelling.

Throughout this case, Petitioners have challenged the variance denial solely on state law grounds. Indeed, Petitioners' first mention of *any* federally based claim appeared only as a passing reference in their motion for rehearing, filed in the Ohio Supreme Court subsequent to that Court's decision denying Petitioners relief. Petitioners raised no federal issues either in the Court of Appeals (*See* Court of Appeals Assignments of Error at A-1) or in the Ohio Supreme Court (*See* Supreme Court Propositions of Law at A-3). Indeed, Petitioners admit that the first time they have raised federal issues is at this stage of the proceedings. Petition at 10.

This Court has consistently held that the failure to raise a federal question until after the highest state court has ruled on the merits renders the claim jurisdictionally deficient. *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958).* Moreover, the land use issues argued in the Certiorari Petition do not raise a substantial federal question. Consequently, the Petition for Certiorari should be dismissed.

Petitioners' Petition for Certiorari is defective for a second reason. The Ohio Supreme Court rendered its opinion on April 11, 1986. Under Rule IX, Section 1 of the Ohio Supreme Court Rules of Practice (A-5), Petitioners were required to file their motion for rehearing within 10 days of the decision, *i.e.* by April 21, 1986. No such motion was filed within that time.

Instead, on June 10, 1986, Petitioners filed a motion for leave to file a proposed motion for reconsideration, along with the motion for reconsideration. Contrary to the Petitioners' claims (Petition at 2), the Ohio Supreme Court never ruled on the motion for leave, and instead, summarily denied the motion for reconsideration. *See* Denial of Reconsideration at A-6. Thus, because there was no ruling below granting Petitioners leave to file, nearly two months out-of-rule, the motion for rehearing, the Petition for Certiorari, filed more than five months after the Ohio Supreme Court's final decision, was not filed within the jurisdictionally required time limitation. *See Pfister v. Northern Illinois Finance Corp.,* 317 U.S. 144, 150 (1942); *Bowman v. Loperena,* 311 U.S. 262, 266 (1940).

**See also Beck v. Washington,* 369 U.S. 541, 552-53; *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.,* 228 U.S. 326, 333-34 (1913); *Forbes v. State Council,* 216 U.S. 396, 399 (1910).

Accordingly, because Petitioners did not raise their federal claims in the proceedings below, and because their Petition for Certiorari was not timely filed, there is no reason for the Court to grant Certiorari in this case. Consequently, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

PETITIONERS' COURT OF APPEALS ASSIGNMENTS OF ERROR

First Assignment of Error

The trial court erred to the prejudice of the Appellants in his judgment ruling that the Zoning Board of Appeals conclusions and denial was supported by the preponderance of substantial, reliable and probative evidence.

Issues Presented for Review and Argument

1. It was against the manifest weight of the evidence for the Court to rule that the variance would alter the essential character of the neighborhood. (Finding 4 of Ordinance 1133.06 was not met).

2. It was against the manifest weight of the evidence for the Court to rule that the variance would not represent the minimum variance that will afford relief and that it does not represent the least modification possible of the regulation in issue. (Finding 5 of Ordinance 1133.06 was not met).

Second Assignment of Error

The trial court erred to the prejudice of the Appellants in his judgment ruling that the findings (conditions) of Middlefield Ordinance 1133.06 are mandatory and apply to all types of variance requests, including "area" variances.

Issues Presented for Review and Argument

1. The trial courts ruling was contrary to law in that the Appellants "area variance" is subject to lesser restrictions in that; it need not establish special hardship or uniqueness, the self-imposed hardship rule does not apply and it need not establish financial hardship.

2. The trial courts ruling was contrary to law in that to grant the Appellants "area variance" only one major requirement is necessary to be met; the evidence must indicate that the hardship on the owner if denied the variance must outweigh the community detriment if granted.

Third Assignment of Error

The trial court erred to the prejudice of the Appellants in his judgment ruling denying the Appellants motion for findings of separate conclusions of fact and law.

Issue Presented for Review and Argument

The trial courts ruling was contrary to law in that Civil Rule 52 has application to the instant case.

PETITIONERS' PROPOSITIONS OF LAW IN OHIO SUPREME COURT

Proposition of Law No. 1

A Court of Appeals Decision cannot be reversed based on a contention that an applicant is not entitled to a variance request because it would alter the character of the neighborhood and would not represent the minimum variance, when it is supported by insufficient reasoning.

Proposition of Law No. 2

A Court of Appeals Decision cannot be reversed based on a contention that an applicant is not entitled to a variance request because they have not shown a sufficient financial hardship under the practical difficulties test, when it is supported by insufficient reasoning.

Proposition of Law No. 3

A Court of Appeals Decision cannot be reversed based on a contention that an applicant is not entitled to a variance request because such request is for a non-allowable use variance, when it is supported by insufficient reasoning.

Proposition of Law No. 4

A Court of Appeals Decision must be affirmed reversing a Common Pleas Court ruling which upheld a denial of a variance by a Zoning Board of Appeals, where such Board erroneously applied "unnecessary hardship" standards of a zoning ordinance to an area variance review and solely denied such variance based upon such standards.

Proposition of Law No. 5

A Court of Appeals Decision must be affirmed reversing a Common Pleas Court ruling which upheld a denial of a variance by a Zoning Board of Appeals, where the facts or evidence in the Record before the Zoning Board of Appeals clearly indicate that: the Courts stated findings are unsupported by sufficient evidence (a preponderance of substantial, reliable and probative evidence on the whole record) and that, under the applicable well-established law of the practical difficulty test, each and every one of the factors or considerations of such test have been favorably satisfied toward establishing or demonstrating a practical difficulty, therefore justifying the granting of the variance.

RULES OF PRACTICE

RULE IX. MOTIONS FOR REHEARING AND ISSUANCE OF MANDATE

Section 1. Motion for Rehearing

A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

Section 2. Issuance of Mandate

Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing. No mandate shall issue on denial of a motion to certify or a motion for leave to appeal, or upon the sustaining of a motion to dismiss an appeal as one not involving a substantial constitutional question.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated July 16, 1986)

Case. No. 85-350

THE SUPREME COURT OF OHIO
COLUMBUS

RICHARD A. DUNCAN, *et al.*,
Appellees,

v.

VILLAGE OF MIDDLEFIELD,
Appellant.

REHEARING ENTRY
(Geauga County)

It is ordered by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ FRANK D. CELEBREZZE
Chief Justice